

Offering Monetary Rewards to Public Whistleblowers: A Proposal for Attacking Corruption at Its Source

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Inci Akpinar, the vice president of a company called Atlas Texas Construction & Trading, sat down with an official from the Louisiana Department of Education a little more than a year ago and made him an offer.

As the state official, Folwell Dunbar, recalled in a memo to department colleagues, Akpinar flattered him with “a number of compliments” before getting to the point: “I have twenty-five thousand dollars to fix this problem, twenty thousand for you and five for me.”¹

Public corruption costs the American taxpayers untold millions of dollars per year.² We are all familiar with the visible, direct costs of corruption: inflated costs for government contracts, hires based on patronage instead of merit, and well-connected politicians enriching themselves at public expense. Less obvious, but no less pernicious, are the indirect costs ranging from increased interest rates on government bonds³ to lost trade opportunities⁴ to increased traffic deaths.⁵

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¹ Andrew Vanacore, *Abramson Charter in Eastern New Orleans Shut Down Amid TP Investigation into Startling Misconduct*, NEW ORLEANS TIMES PICAYUNE, July 15, 2011, at A1, available at http://www.nola.com/education/index.ssf/2011/07/abramson_science_and_technolog.html. The alleged bribe offer concerned complaints made by parents to the state Department of Education regarding Abramson Science & Technology Charter School, a New Orleans charter school with ties to Atlas Texas. *Id.* As this article went to press, Akpinar has not been charged with any crime related to these allegations. A copy of Dunbar's memo may be found at www.fox8live.com/media/lib/137/5/c/9/5c904841-d4d3-42f5-9a0f-66f1d3f1aacf/Abramson_letter_3.pdf (last visited March 21, 2012).

² It is impossible to determine the exact number, and difficult to even arrive at a meaningful estimate. This uncertainty is partly because “public corruption” is a wide-ranging term covering many kinds of wrongful acts, and partly because the full costs of corruption are notoriously difficult to measure.

³ Craig A. Depken, II & Courtney L. LaFountain, *Fiscal Consequences of Public Corruption: Empirical Evidence from State Bond Ratings*, 126 PUB. CHOICE 75 (2006).

⁴ Tina Søreide, *Corruption in International Business Transactions: The Perspective of Norwegian Firms*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, 381, 389, 393 (Susan Rose-Ackerman ed., 2006). Søreide surveyed CEOs of Norwegian export firms, over one-third of whom stated that their company had chosen not to do business in a particular country or region because of endemic corruption. *Id.*

⁵ There is a positive correlation between high levels of corruption and traffic fatalities per mile driven. TOM VANDERBILT, *TRAFFIC: WHY WE DRIVE THE WAY WE DO (AND WHAT IT SAYS ABOUT US)* 235–36 (Knopf, 2008). Although it is impossible to say corruption *causes* traffic deaths, it is plausible that people will be less likely to follow the rules of the road if the local traffic police are

Legislative efforts to combat public corruption generally focus on catching and punishing those who have already offered or received a bribe. This approach is limited by its reactive nature: although the threat of punishment provides some deterrent, the primary effect of these laws is to penalize bribery *after* it has already occurred. In the meantime, corrupt practices may go on for years before an arrest is made. Lengthy prison terms can satisfy the public desire for punishment, but they cannot undo the harms caused by the corruption.

This article suggests a different approach, geared to preventing corruption from happening in the first place. Instead of simply punishing public officials who accept bribes, states should offer monetary rewards to public officials who, when offered a bribe, turn in the would-be briber.

A public official already has a moral duty (and, in some states, a legal duty) to report anyone who offers a bribe.⁶ But this duty is enforced only by the threat of criminal sanctions and removal from office if the official's actions ever come to light. Along with the stick, I propose offering a carrot: if a public official reports a bribe offer, leading to the conviction of the offeror, the state will pay the reporting official the full amount of the offered bribe. By tying the amount of the reward to the amount of the bribe, we remove any financial incentive the official would have to take the bribe. Why accept a \$10,000 bribe and risk arrest, removal from office, and imprisonment, when you can recover the same \$10,000 by turning the would-be briber in to the authorities?⁷

The proposal is simple and straightforward, and so is this article. The first section presents a basic outline of the proposal and why it works to reduce the incidence of both bribery and attempted bribery. The second section anticipates potential objections and responds to them. After a short conclusion, the appendix is a proposed model act.

I. ADJUSTING THE INCENTIVES: AN ECONOMIC THEORY OF BRIBERY

This article's central premise is that, before someone decides whether to either offer or accept a bribe, both the offeror and offeree perform a cost/benefit analysis.⁸ While it is certainly true that many criminals are not particularly rational

known to be amenable to small bribes. Or it may simply reflect a society without a strong tradition of respecting the laws, whether related to bribery or driving.

⁶ See, e.g., ALASKA STAT. § 11.56.124 (2010); CONN. GEN. STAT. § 53a-148a (2011).

⁷ Compare to the traditional *qui tam* action, which allows a private party to bring a lawsuit on behalf of the government. If the suit is successful, the claimant may claim a portion of any recovery as a reward. Under the federal False Claims Act, the most commonly used *qui tam* statute, a private party may sue anyone who has presented a "false or fraudulent claim for payment" to the government. 31 U.S.C. §§ 3729-30 (2009). If successful, the claimant is entitled to recover between 15 and 25 percent of the award. *Id.*

⁸ "A person commits a crime because the expected benefits exceed the expected costs." RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 219 (Aspen Publishers, 7th ed. 2007). That is, "only if his expected utility from [committing a crime], taking into account his gain and the chance of his being caught and sanctioned, exceeds his utility if he does not commit the act." A. Mitchell Polinsky

persons, this analysis is particularly well suited to white-collar crimes such as corruption. Unlike crimes motivated by anger or revenge, such crimes involve a purely monetary calculation on the part of the criminal. As the article will establish, offering a reward for turning in an attempted briber fundamentally alters the result of the cost/benefit analysis for both parties to the potential bribe.

A. Adjusting The Incentives for the Public Official

When a public official is offered a bribe, the official must decide whether the financial gain from taking the bribe outweighs the potential ill effects if the bribe is discovered. This cost/benefit analysis can be abstracted in the following equation:

$$(B_p \times P_{Bp}) + (B_f \times P_{Bf}) > M + ((C + J + S) \times P_c)$$

The left side of the equation lists the potential benefits of taking the bribe. B_p is the value of the present bribe; that is, the amount of the bribe offer currently on the table. P_{Bp} is the probability that the present bribe will actually be collectible—the official must take into account the possibility that even if he accepts the offer, the bribe might not actually be paid. B_f is the potential value of any future bribes that may be offered, discounted by the estimated probability that there will actually be any future bribes (P_{Bf}).

The right side of the equation lists the primary costs of taking a bribe. M includes any moral qualms that the official may feel about taking a bribe. C is the possible criminal sanction (whether fines or prison time) that the official may face if caught. J is the possibility that the official will be removed from office, and S represents the social costs of developing a dishonest or untrustworthy reputation. All of these costs (with the exception of the internally generated moral costs) are discounted by the official's estimate of the chance of being caught (P_c).⁹ The probability of being caught is perhaps the most important variable on this side of the equation—criminals are willing to take the risk of a potentially severe prison term if they are confident they can escape punishment, but unwilling to risk a lesser sanction if there is a good chance they will be caught.¹⁰

Most proposals for reducing corruption focus on the right-hand side of the equation by increasing the corrupt official's expected costs. This can be done in

& Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 47 (2000).

⁹ There is some simplification here, as the value of P_c is actually slightly different for each potential harm. For instance, where there is only circumstantial evidence of a bribe, this may be enough to cause the bribe-taker to lose his job or good reputation, but not enough to meet the "beyond a reasonable doubt" standard in criminal court.

¹⁰ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968); Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 138 (1995).

several ways. Public entities work to create a culture of honesty, thereby increasing the officials' moral misgivings about bribe-taking and increasing the social stigma of corruption. "Sunshine laws" make public business more transparent, increasing the odds that a bribe will be detected.¹¹ Law enforcement can focus resources on enforcing public corruption laws, thereby making it more likely that an official who accepts a bribe will be brought to justice.¹² The threat of criminal sanctions can be increased by imposing lengthy prison terms.¹³

Unlike these more traditional anti-corruption measures, the proposed reward system addresses the *left* side of the equation by reducing the expected benefits of accepting a bribe:

$$((B_p \times P_{Bp}) - (T \times P_t)) + (B_f \times P_{Bf}) > M + ((C + J + S) \times P_c)$$

The reward system introduces a new variable, *T*, into the equation, where *T* represents the value of the offered reward; similarly, *P_t* represents the probability that the reward will be collectible. The expected value of (*T* × *P_t*) is negative because an official who decides to take a bribe loses the chance to collect a reward. The amount of the reward is tied to the bribe offer (i.e., *T*=*B_p*), so, if *P_t* is greater than or equal to *P_{Bp}*, the marginal value of the present bribe offer approaches zero (and may even be negative). This completely removes the official's primary motivation for taking a bribe by reducing or eliminating the first and most important variable in the above equation—the value of the bribe that is currently on the table.

Once the enticement of a reward is added into the equation, there are only two situations where a public official may be tempted to take a bribe. First, the official may believe that *P_{Bp}* is significantly greater than *P_t*. This happens if the official suspects he will be unable to collect on the reward—basically, if the official has

¹¹ Teresa Dale Pupillo, Note, *Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L. Q. 1165, 1166 (1993).

¹² Former U.S. Attorney General Mike Mukasey said the "investigation and prosecution of public corruption is among the highest obligations of law enforcement, and it should come as no surprise that I consider it to be one of the top priorities of the Department of Justice." PETER J. HENNING & LEE J. RADEK, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION* 376 (2011). The FBI identifies public corruption as its "top priority" and refers to the presumably expensive "complex undercover operations and surveillance" often required in corruption investigations. *Public Corruption*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/investigate/corruption> (last visited March 16, 2012). The FBI claims that, as of June 30, 2011, it is actively working over 2,000 public official corruption investigations throughout the country. *Id.*

¹³ Colleen B. Dixon, Jonathan B. Krisch & Craig Thedwell, *Public Corruption*, 46 AM. CRIM. L. REV. 927, 942 (2009). About 75% of the bribery defendants convicted in federal court in 2008 and 2009 were sentenced to jail time. U.S. SENTENCING COMM'N 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 28 (2008) available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/Table12.pdf; U.S. SENTENCING COMM'N 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 12 (2009) available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table12.pdf. The rest received probation, at-home confinement, or some combination of both. *Id.*

more faith in the briber than in the government. However, even then the official will only take the bribe if the bribe offeror is so much more trustworthy that the increased chance of recovery outweighs the substantial costs the official may incur by taking a bribe.

Second, the official may wish to accept the initial bribe in order to keep open the possibility of future bribes. Because the reward offer is tied only to the value of the present bribe, it does not compensate the official for the lost value of any future bribes. Therefore, if the official believes that P_{Bf} is high, the official may be inclined to take the risk of accepting a bribe in the hope of being recompensed by lucrative future bribes. However, in most cases the value of potential future bribes will be heavily discounted due to their inherent uncertainty. It would require a high tolerance for risk to engage in corrupt practices based on the mere speculation of the possibility of a future bribe.¹⁴

B. Adjusting the Incentives for the Bribe Offeror

Although the first effect of the reward system is to deter public officials from accepting bribes, its true value comes in discouraging would-be bribers from making an offer in the first place. The potential of a reward affects the cost/benefit analysis from the perspective of the briber, who decides whether to offer a bribe according to the following equation:

$$(R_p \times P_{Rp}) + (R_f \times P_{Rf}) > M + ((C + S + J) \times P_c) + B_p + (B_f \times P_{Bf})$$

Benefits are again on the left, costs on the right. R_p represents whatever benefit the briber hopes to gain from the bribe.¹⁵ Unlike the public official who has been offered a bribe and is therefore fairly sure of its value, the briber must take into account the possibility that the official will turn down the bribe offer or be unable to deliver. P_{Rp} represents the probability that the briber will actually receive the benefits of the bribe. The briber, like the bribee, may hope for a future continuing benefit from the corrupt relationship, R_f , which is discounted for uncertainty (P_{Rf}).

As with the official, the costs to the potential briber include moral qualms (M)

¹⁴ It is important to distinguish between truly contingent future bribes and bribes paid on the installment plan. If a bribe offer involves a \$10,000 payment upfront and an additional \$10,000 payment in six months that second payment should be considered part of the initial bribe offer and the reward offer would be \$20,000. B_f only encompasses uncertain additional bribe offers that may be offered in the future.

¹⁵ More specifically, R is the economic rent that the briber hopes to gain from the corruption. For instance, if the competitive bid price on a government contract would be \$80,000, but the contractor offers a bribe with the hopes of extracting \$100,000 for that same work, the rent (R) is \$20,000, some of which will be paid to the bribee. Seen in these terms, a bribe is effectively an agreement between the public official and the contractor to unlawfully extract a payment from the government and split it between themselves.

and the probability (P_c) of being caught and subjected to criminal penalties (C), social sanctions (S), or losing his job (J). The briber also must take into account the cost of the bribe itself (B_p) and the possible costs of any future bribes ($B_f \times P_{Bf}$).

Unlike the public official, who has the benefit of being the second mover, the potential briber must commit to a course of action (offer the bribe or not?) without knowing how the other party will respond. The briber must attempt to predict how the public official will act and tailor his actions accordingly.¹⁶ With the reward system in place, the would-be briber knows that, no matter how much initial bribe money is offered, the public official can recover an equal amount as a reward. The briber also knows that, in order to recover the reward, the official must make a report to the authorities. This both decreases the odds that the bribe will be accepted (P_{Rp}) and increases the odds that the briber will be caught (P_c)—a lose-lose scenario.

Bribery is, by its very nature, a collusive crime that gives both parties an incentive to keep it hidden.¹⁷ As it currently stands, the briber can rely on a co-conspirator (i.e., the official) to help keep the bribe a secret because the official, too, stands to lose a great deal if the scheme is discovered. Even if the official does eventually cooperate with investigators, the official's testimony will be irreparably tainted: "[t]he importance of public corruption cases often is matched by the difficulty that prosecutors face in bringing them successfully because the government frequently relies on cooperating witnesses who were involved in highly questionable dealings."¹⁸ The briber, knowing that jurors will be unlikely to believe the testimony of a crooked official, may feel confident in his ability to beat the charges.

But where one party has a strong incentive to report the crime, and can remain clean in doing so, offering a bribe is significantly riskier. Once would-be bribers realize that corrupt officials have an economic incentive to turn them in, the calculus for offering a bribe changes and fewer bribes are offered. The reward system thus begins with fewer bribes being accepted because there is no reason for a public official to take the risk of going corrupt. As fewer public officials are willing to accept a bribe, the absolute number of bribe offers drops as well.¹⁹

¹⁶ This is a simple definition of game theory, which posits that "a rational person in deciding how to act will consider the probable reactions of others; he will, in other words, act strategically." POSNER, *supra* note 8, at 19.

¹⁷ "Corruption typically takes place as an exchange between individuals who both, or all, would prefer to keep the transaction hidden." James E. Alt & David Dreyer Lassen, *Enforcement and Public Corruption: Evidence from US States 2* (Univ. of Copenhagen Econ. Pol. Research Unit Working Paper No. 2010-08, 2010).

¹⁸ HENNING & RADEK, *supra* note 12, at 377.

¹⁹ In economic terms, a downward shift in the demand curve. See ROBERT E. HALL & MARC LIEBERMAN, *ECONOMICS: PRINCIPLES AND APPLICATIONS* 76–77 (South-Western College Publishing, 2009).

II. FINE-TUNING THE PROPOSAL

Offering monetary rewards to public officials has the potential to create its own set of problems. The following section suggests ways to mitigate some of these concerns by tweaking the basic scheme set forth above.

A. Preventing False Accusations

The prospect of collecting reward money may present dishonest public officials with the perverse incentive to generate false bribery allegations solely in order to turn in the supposed “briber” and collect the reward. Although the potential of fraud is present in any reward-based system, it is particularly troubling here, where a phony bribery report may lead to an innocent person serving prison time.

There are ways to limit the possibility of false accusations. The first line of defense is the protection accorded to defendants by the criminal justice system. To successfully collect on a phony reward, an official must generate sufficient fake evidence to convince a jury of guilt beyond a reasonable doubt. The accused would no doubt subject the official to intense cross-examination based on his financial incentive in securing a conviction.²⁰ The official would have to concoct phony evidence and commit perjury on the stand and, if the ruse is discovered, he will be wholly discredited, lose his position, and be subject to criminal penalties for making knowingly false accusations.

As an additional safeguard, the legislature may enact a rule stating that, when an official is seeking a reward, the official’s testimony alone is insufficient to support a conviction absent some corroborating evidence. A similar system is in place in states that do not allow a criminal conviction based solely on the testimony of a co-conspirator or accomplice.²¹ These statutes are primarily based on the theory that an accomplice (like a public official seeking a reward) has something to gain by pinning the crime on someone else, so the accomplice’s testimony is automatically suspect.²² By requiring some independent

²⁰ See, e.g., *Harris v. U.S.*, 371 F.2d 365, 367 (9th Cir. 1967) (“A witness’s possible financial stake in the particular case is highly relevant”); *Wheeler v. U.S.*, 351 F.2d 946, 947–48 (1st Cir. 1965) (case involving an “informer’s reward,” holding that it is “clear that inquiry into the possible financial stake of a witness in a particular outcome of a case in which the witness is testifying is a proper subject for cross-examination”); *State v. Tiernan*, 941 A.2d 129, 133–34 (R.I. 2008).

²¹ ALA. CODE § 12-21-222 (2005); ALASKA STAT. § 12.45.020 (2010); ARK. CODE ANN. § 16-89-111(e)(1) (2010); CAL. PENAL CODE § 1111 (2010); GA. CODE ANN. § 24-4-8 (2010); IDAHO CODE ANN. § 19-2117 (2004); IOWA CODE § 2.21(3) (2002); MINN. STAT. § 634.04 (2009); MONT. CODE ANN. § 46-16-213 (2011); NEV. REV. STAT. § 175.291 (2011); N.Y. CRIM. PROC. LAW § 60.22 (2003); N.D. CENT. CODE § 29-21-14 (2006); OKLA. STAT. tit. 22, § 742 (2003); OR. REV. STAT. § 136.440 (2007); S.D. CODIFIED LAWS § 23A-22-8 (2011); TEX. CODE CRIM. PROC. ANN. art. § 38.14 (Vernon 2005); *Sherrill v. State*, 204 Tenn. 427, 321 S.W.2d 811 (Tenn. 1959).

²² The secondary justification for accomplice testimony statutes is that an accomplice, as an admitted criminal, has a presumptively untrustworthy character. *Austin v. State*, 491 P.2d 724, 730–

corroborating evidence, it becomes more difficult for a public official to simply make up a bribery offer in order to collect a reward.²³

B. Preventing Collusive Bribes

A related problem is the possibility of collusion between a public official and another person in an attempt to wrongfully collect a reward. To illustrate this possibility, consider this hypothetical: a dishonest official convinces a co-conspirator to offer a large bribe without intending to actually carry through with it. The official reports the supposed bribe and collects the reward money. The co-conspirator, once out of prison, receives a cut of the proceeds. This situation is somewhat trickier than a unilateral false accusation because, where there is collusion, neither party has an incentive to prove the allegation false. Instead, both parties want to convince the court that the bribe offer was real.

As an initial matter, this scenario is strongly self-limiting because it requires one of the parties to willingly agree to be convicted in criminal court. It is conceivable that some criminals may see a one or two year prison sentence²⁴ as a fair trade for a potentially large monetary reward. However, while the average criminal knows there is a risk of going to jail, the co-conspirator in this scheme *must* be convicted in order to collect the money. The requirement of a criminal conviction seriously changes the calculus—while people may be willing to accept the risk of a prison term, they are far less likely to accept it as a certainty.²⁵ No one commits a crime expecting to be caught, much less knowing that being caught is an integral part of the plan.

To further lessen the opportunity for collusion, the model act conditions any reward on the trial court finding: (1) the bribe offer was made with specific intent

31 (Nev. 1971). That justification does not apply with equal force here; one hopes that public officials are, on the whole, more trustworthy than criminals. At the very least, public officials have more to lose from perjury and will be hesitant to risk their careers and freedom for the possibility of collecting a monetary reward.

²³ If the corroborating evidence rule were applied too strictly, for instance by requiring written proof of a bribe or recorded evidence of a conversation involving the bribe, it would defeat the purpose of the statute. If the process of gathering evidence to collect the reward is made unduly burdensome, officials may decide it is simply easier to take the bribe. However, the accomplice testimony statutes cited in footnote 21 are generally more lenient, and require only *some* corroborating evidence, even if it is entirely circumstantial, tending to show a connection between the accused and the crime. See, e.g., *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008); *State v. Clark*, 755 N.W.2d 241, 253 (Minn. 2008).

²⁴ The Federal “base offense level for bribery, extortion, and right of honest services convictions under [Federal Sentencing Guideline] § 2C1.1 is 14 for a public official and 12 for other defendants The base offenses level applied to the Sentencing Table would result in a term of imprisonment of fifteen to twenty-one months for a public official, and ten to sixteen months for a defendant who is not a public official.” HENNING & RADEK, *supra* note 12, at 423–24.

²⁵ Increasing the probability of detection has a stronger deterrent effect on criminals than increasing the maximum punishment. Becker, *Supra*, note 10, at 178; Block & Gerety, *supra* note 10, at 138.

that the bribe be actually accepted and the *quid pro quo* carried out; (2) there was a reasonable possibility that the offeror would have been in a position to pay the bribe; and (3) the public official did nothing to incite or encourage the bribe offer.

By limiting the reward offer to unsolicited, serious bribe offers, we reduce fraudulent filings and prevent a public official from gathering a windfall from turning in a desperate, but impecunious, person who offers a bribe that the offeror realistically cannot pay. Subsection (3) addresses the possibility that a public official may coerce an innocent party into offering a bribe, then turn that party in to collect the reward.²⁶ An official who affirmatively solicits a bribe is not entitled to recover a reward and, presumably, will be the subject of a separate criminal investigation.

C. Paying For the Rewards

The most immediate roadblock to enacting the proposal is political. The idea of paying government employees to report attempted bribes will not be intuitively popular among taxpayers, who may resist the idea of paying public officials extra for doing something they are already morally obligated to do. However, people respond to incentives, and the best way to convince officials to report attempted bribes is to provide the proper incentive.

The idea of offering rewards for honesty is not as radical as it initially seems. It is widely accepted that underpaid government employees are more likely to take bribes to supplement their meager salaries.²⁷ By paying civil servants a working wage, governments reduce the temptation to take bribes. The reward system is simply a further application of this well-recognized concept.

The public's initial concern may be the fiscal costs of paying the reward money. However, when taking into account the money the state will save in the long run via reduced levels of public corruption, the long-term effect on the public fisc should be positive. The issue is one of perception—reward payments are a highly visible outlay of money, while the attendant benefits are subtle and even unquantifiable. The easiest way to visibly reduce the direct costs of a reward program is by imposing on the convicted bribe offeror a criminal fine equal to the amount of the offered bribe, meaning the state's net outlay will be zero.

This presupposes that the fine will be collectible, which is often not the case

²⁶ That is also a risk under the current legal regime, where public officials can and do lean on private parties for bribes and other perks. The recourse in such a situation would be the same as it is now—immediately report the official to the authorities.

²⁷ See, e.g., Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 6 (1974). Becker and Stigler refer to a "supply of honesty" which, like any other skill, must be paid for via higher wages. *Id.* at 3. Hiring a worker with high levels of honesty is like hiring a worker with an advanced degree—you have to pay a premium. For empirical evidence, see Caroline Van Rijckeghem & Beatrice Weder, *Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?* (Int'l Monetary Fund, Working Paper No. 97/73, June 1997).

in criminal proceedings. However, white-collar criminals are wealthier than the average convict, and thus presumably more likely to be able to pay a fine.²⁸ Moreover, the reward will not be paid unless the trier of fact finds there was a reasonable possibility that the offeror was actually in a position to pay the bribe. A defendant who is able to pay the bribe should be able to pay the same amount as a fine. If the court finds the briber is acting as an agent on behalf of another person or a company, the principal may be also held liable for the fine.

The potential fine also acts as a powerful disincentive for the offeror. If convicted, not only does the offeror face jail time, he must effectively pay the bribe without receiving any of its benefits. Tying the fine to the reward also tailors the punishment to provide the appropriate amount of "sting" to the individual defendant.²⁹ Defendants with greater resources are more likely to offer large bribes and more likely to be able to pay larger fines.³⁰ This kind of proportionality is absent in criminal corruption statutes that either set a certain fine or, at best, allow the court to choose from a relatively narrow monetary range.³¹ Under these statutes, the court lacks the proper leeway to craft an appropriate punishment. Where the amount of the fine is preset, some defendants may consider the amount so large as to be unpayable, while others might consider it as a minor cost of doing business.

Finally, it would be a serious mistake to consider only the fiscal costs of this proposal without taking into account its benefits. The primary benefit, of course, is the reduction of corruption and its concomitant costs, through which the proposal should pay for itself. But there are also many indirect benefits. Traditional methods of combating corruption can be quite expensive. If law enforcement devotes more resources to fighting corruption, taxpayers must pay for additional investigators.³² If longer jail terms are imposed, there are vastly increased

²⁸ Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 409 (1980); Stanton Wheeler et al., *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, 340, 345 (1988).

²⁹ Posner, *supra* note 28, at 413–16. This is somewhat akin to a punitive damages award, which takes into account the defendant's wealth in order to provide the appropriate level of deterrence based on the defendant's ability to absorb the cost.

³⁰ There is always the possibility that a briber will be unable to pay the fine. In a reward-based system, the risk of non-payment is borne by the government. Alternatively, the bribee could be granted the right to seek direct restitution from the briber, thus placing the risk of non-payment on the bribee and removing the state from the equation entirely. While placing the risk on the official may save the state some money in the short term, it will reduce the reporting official's expected recovery and therefore lead to fewer reported bribes.

³¹ A minority of jurisdictions adjusts the fine for bribery based on the amount of the bribe. See CAL. PENAL CODE §§ 68, 93 (West 2011); D.C. CODE § 22-712 (2001); KY. REV. STAT. ANN. § 534.040(1) (LexisNexis 2008) (fine is double the gain from the offense). Other states impose fines for bribery which are so low that they are effectively meaningless as a deterrent. See LA. REV. STAT. ANN. § 14:118 (2011) (maximum fine is \$1,000); MD. CODE ANN., CRIM. LAW § 9-201 (West 2006) (\$100–\$5,000); N.H. STAT. ANN. § 640.2 (1973) (up to \$4,000).

³² Alternately, no additional investigators are hired, but the department shifts its priorities in favor of corruption investigations, thereby reducing the department's ability to respond to other

additional costs for guarding and housing the prisoners³³ as well as indirect costs on both the convict and the community.³⁴ All these costs can be avoided if there is no incentive to offer a bribe in the first place.

D. Accounting For Low-Money Bribes

A reward-based system works best if the potential reward is attractive enough that people will make an effort to collect. There is little financial incentive for an official to report "everyday" bribes involving small amounts of money, where the potential rewards are correspondingly small.³⁵ An official is unlikely to go through the trouble of reporting a bribe and testifying at trial simply to collect a reward of \$50.

The simplest solution is to establish a minimum reward, akin to statutory damages, or to allow treble recovery when the bribe offer is under \$500. This will provide public officials with some incentive to report even small bribes, while not overcompensating them to the point where reporting a small bribe may lead to a windfall.³⁶ Although many small bribes will still go unreported, this should at least create some doubt in the minds of potential bribers and force them to think twice before offering even a minor bribe.

III. CONCLUSION

Corruption imposes serious costs on the taxpayer and erodes public trust in the government. The current methods of combating corruption are expensive and imperfect, and corrupt practices linger in some governmental entities. Offering rewards to public officials who report attempted bribes is a relatively cheap and easily implemented method of both removing the incentive to take a bribe and

crimes.

³³ Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–88 (2005).

³⁴ Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 345–48 (2004).

³⁵ There remains a moral (and in some cases legal) duty to report such a bribe offer. This internal control is somewhat diminished for small money bribes, as the moral imperative to report an offer of \$20 is presumably weaker than the moral imperative to report a \$20,000 bribe.

³⁶ "Trebling [damages] provides a powerful incentive to investigate, detect, and prosecute...." Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 783 (1987); *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 530 n.20 (1983) (double or treble damages "provide otherwise remediless small consumers with an adequate incentive to bring suit.").

turning the briber against the bribe, thus breaking down the collusive atmosphere that corruption needs in order to flourish.

APPENDIX: MODEL ACT

§ 1.1 DEFINITIONS

- A. “Bribe Offer,” for the purposes of this Act only, is an offer of anything of apparent present or prospective value to a public official, or to any person or entity in whose welfare the public official is interested, made with the intent to influence the public official’s conduct in the performance of the official’s public duties. It does not include an advantage promised generally to a group or class with no special benefit to any particular beneficiary.
- B. “Corporate Entity” means any fictional person organized under the laws of this State, any other State, or any foreign country. It includes, but is not limited to, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, professional corporations, and similar entities.
- C. “Public Official” means any officer or employee of government, including legislators and judges, or any independent contractor of the government working within the scope of the duty as a government independent contractor, or a juror. It also includes any person who has been nominated, appointed, or elected to be a public official.

§1.2 DUTY TO REPORT BRIBE OFFERS

Any public official who is offered a bribe offer, or who witnesses another public official being offered a bribe offer, has a duty to report that bribe offer to the official’s immediate supervisor or to the appropriate law enforcement authorities. If the public official reports the bribe offer in a timely fashion, the public official may be entitled to recover a whistleblower’s reward as set forth below.

§1.3 WHISTLEBLOWER’S REWARD

- A. If a public official timely makes a report of a bribe offer under Section 1.2 above, leading to the criminal conviction or guilty plea of the person who made the bribe offer, the public official is entitled to a reward as follows:
 - 1. If the bribe offer is in the form of cash or a cash equivalent, the greater of either \$500 or the amount of the offer;
 - 2. If the bribe offer is not in the form of cash or a cash equivalent, the reasonable cash value of the goods or services which make up the offer, but in no case less than \$500.

§1.4 BURDENS OF PROOF

- A. The payment of any reward under this Act is contingent upon a finding that:
 - 1. the bribe offer was made with specific intent that the public official accept the bribe offer and render some benefit or consideration in return, or with specific intent to influence the public official's conduct in the performance of the official's public duties;
 - 2. there was a reasonable possibility that the offeror, or the person or corporate entity who he represents, would have been able to pay the bribe offer if it were accepted; and
 - 3. the reporting public official did not, either personally or through an agent, incite or solicit the bribe offer.
- B. If a public official seeks recovery of a reward under this statute, the testimony of that public official alone shall be insufficient to support a criminal conviction without independent corroborating evidence.

§1.5 FINES

- A. In addition to any prison term or criminal fine imposed by other law, anyone convicted pursuant to a report under this Act shall be fined in the following amount:
 - 1. If the bribe offer is in the form of cash or a cash equivalent, the greater of either \$500 or the amount of the offer; or,
 - 2. If the bribe offer is not in the form of cash or a cash equivalent, the reasonable cash value of the goods or services that make up the offer.
- B. If the bribe offeror is found to have acted on behalf of a corporate entity, with its explicit or implicit authorization, and offers the bribe on the behalf of that corporate entity, the corporate entity shall be jointly and severally liable for the full amount of the fine.
- C. If the bribe offeror is found to have acted on behalf of another person, with that person's explicit or implicit authorization, and offers the bribe on the principal's behalf, the principal shall be jointly and severally liable for the full amount of the fine.

§1.6 PENALTY FOR FRAUDULENT REPORT

- A. Whoever submits a knowingly fraudulent report under this Act, with the intent to collect a reward, shall be
 - 1. Immediately dismissed from public office or employment and

lose all rights and benefits thereto, insofar as is permitted by law; and

2. Fined in the amount of the alleged bribe set forth in the fraudulent allegations, or imprisoned, with or without hard labor, for not less than one year and not more than three years, or both.

§ 1.7 STATUTORY INTERPRETATION

The provisions of this Act shall be interpreted broadly to give full effect to their intent to deter public bribery.

